AN ARGUMENT

ON BEHALF OF THE

DEFENDANTS,

IN THE CASE OF

ISAAC SHELBY, a Citizen of Kentucky,

versus

JOHN BACON, ALEXANDER SYMINGTON, THOMAS ROBINS, JAMES ROBERTSON, RICHARD H. BAYARD, JAMES S. NEWBOLD, HERMAN COPE and THOMAS S. TAYLOR, Citizens of the State of Pennsylvania.

Supreme Court of the United States.

DECEMBER, 1850.

PHILADELPHIA:
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1851.

THE case of Shelby *versus* Bacon and others, Trustees of the Bank of the United States, was commenced on the 16th of December, 1846, by Bill in Equity, in the Circuit Court of the United States for the Eastern District of Pennsylvania. On the question to which it gave rise, the Judges differed in opinion, and certified the difference to the Supreme Court of the United States. On the 16th of December, 1850, the case was argued before that Court by Henry Clay, on the part of the complainant, and on the part of the defendants, by George M. Wharton, and the the author of the present argument. The decision recently pronounced by the Court, has rendered it probable that the case may again present itself before that tribunal, in a modified form, and has suggested to counsel the propriety of a more permanent record of their views. To the creditors of the Bank, who have an entire right to know the grounds on which the case is placed by the defendants, it has been supposed that the information contained in the opening argument of their counsel might prove serviceable. An inducement to publication may also be found in the interest which has recently attached to all discussions respecting the collision of local and national authority. Of the conflicting jurisdiction of the State and Federal Courts, the present case may be regarded as furnishing an instance of more than ordinary importance.

WM. A. PORTER.

Philadelphia January 20th, 1851.

ARGUMENT, ETC.

I AM to state, in the first place, the facts on which the present case turns. A reference has been made to them by the counsel of the complainant, but so partial and incomplete, as to cast an imperfect light on the questions involved in the controversy. The record contains numerous documents, and embraces amounts, dates, and decrees, which it is necessary the Court should understand, before any just decision can be pronounced.

The Pennsylvania Bank of the United States was chartered on the 18th day of February, 1836. Its existence was of short duration. In the early part of the year 1841, from causes which do not now concern us, it became embarrassed, and unable to fulfil its engagements. On the first day of May, of that year, for the purpose of securing the payment of certain post notes held by ten banks of the city and county of Philadelphia, it divested itself of a portion of its property, by an assignment, bearing date of that day. I mention this paper to remark, that it is the only assignment executed by the Bank, with which the Court, in the present case, have nothing to do. On the 7th of June, 1841, after an unsuccessful effort to sustain its credit, an assignment was executed to three of the trustees who are parties to the Bill, for the purpose of securing the payment of its notes, post notes and deposits. On the 4th of September, of the same year, when the hope of regaining its position had been abandoned, a third assignment was executed, providing for the *pro rata* payment of all the liabilities of the Institution. Two days afterwards, a supplemental deed was made, conveying certain hypothecated property on the same trusts. The trustees nominated in both the last-mentioned instruments, are also parties to the complainant's Bill.

The case does not involve the construction of these instruments. To indulge any general observations respecting them, would be a violation of that logical severity which is, at least, due to the place; but I should be disappointed, if they failed to attract some notice from the Court. The product of a professional skill which has made itself felt even before this tribunal, they contain no equivocal proofs of their origin.—These papers consummated a peculiar case of insolvency. They conveyed, perhaps, the largest amount of property ever conveyed for similar purposes. The nominal amount transferred by the June assignment, is stated therein to be more than twelve millions of dollars; and that transferred by the September assignments, reached more than fourteen millions. It was doubtless owing to the magnitude and value of the property thus conveyed, that the Legislature of Pennsylvania interfered, as that body has never done in any other instance within the knowledge of the speaker, by passing a special Act to relieve the trustees from the necessity of giving the security ordinarily required by law. Trustees could not otherwise have been found willing to accept the office.

How much of the assets was good, cannot be told; the fact that a very large proportion of them were valueless, only increased the difficulty of executing the trust. Their local condition is worthy of remark. Thirty-eight closely printed pages of the record were required to tell where but a part of them might be found. They were literally scattered over the world. They consisted of all descriptions of real estate; of mortgages, bonds, judgments, notes, bills and stocks; in short, of almost everything entitled to the name of property, real or personal. Taken, as much as it had been, to secure the payment of doubtful debts, the condition of the titles to it may be the subject of conjecture more easily than of description.

Under these circumstances, the defendants entered upon the execution of their trusts. With the world open before it, the presumption is that the Bank selected for the performance of duties of so responsible and elevated a character, gentlemen of

the highest probity, intelligence, business capacity, and financial skill. I am here to maintain, if it shall in any way be brought in question, that they have from that day to the present, discharged these duties with all the diligence and promptness consistent, on the one hand, with an enlightened humanity to debtors, and with safety to creditors on the other. Sufficient proof of this is found in the fact, that, after the lapse of several years, of the ten thousand creditors interested in the result, and most of them conversant with the facts, the complainant in the present bill is the only party who exhibits any dissatisfaction.

I proceed to the more minute facts. The June trust on the 17th of March, 1846, settled an account in the Court of Common Pleas of Philadelphia county, which embraced their proceedings to the first of January of that year. Before the complainant filed his bill, the September trust had settled in the same Court, four accounts. The first was filed on the 7th of January, 1843, and the last on the 13th of January, 1846. In these settlements were comprehended their proceedings to the 1st of January, 1846. When the bill was filed, these accounts had been confirmed absolutely, and a fifth was in the course of adjustment and confirmation. Up to that time, no complaint had been uttered on the subject of jurisdiction, and no effort made to withdraw the proceedings from that of the Common Pleas. Public notice of the filing of the accounts had been given according to the Pennsylvania statute, —time for exception had been allowed,—auditors had been appointed to examine and adjust the accounts under oath,—their meetings had been extensively advertised in the public newspapers,—they had been largely attended by counsel residing in Philadelphia, acquainted with the facts, and specially retained by creditors for the purposes of inquiry and scrutiny,—parties having large interests at stake had been heard as fully as they desired,—the auditors had reported to the Court in writing their opinions on the state of the accounts and the acts of the accountants,—additional time for exception had there-

upon been allowed, and the accounts had been confirmed absolutely, without dissent on the part of any member of the Court, and without exception or appeal by any creditor.

It is said Mr. Shelby had no notice of these proceedings. Of many of them it was not possible to notify him, for his interest in the judgment on which he claims, was not acquired until the 5th of February, 1845. To oblige the trustees to give personal notice to all the creditors of the bank, would be to require an impossibility. To say that their accounts should not be adjudged finally confirmed, until they had made proof of this notice, would be to say that they shall not be settled at all. The Pennsylvania statute, yielding to the necessity of the case, has provided otherwise; and in place of such notice, has prescribed that series of public notices which were in this instance given by the accountants and the auditors. There was a time when this claimant clearly had actual notice. If he never had it before, the pleas to the bill, which I am about to consider, gave him that notice. If he alledges error in the accounts, why not go into the Common Pleas, then, and move to open them? What peculiar hardship does the case present? In regard to assignments with a stipulation for the release of the debtor within a prescribed time, has it not been universally held that the recording of the instrument is a notice which affects every creditor, wherever he may reside? Coe *v.* Hutton, 1 S. & R. 398; Steel *v.* Tuttle, 15 S. & R. 210; In re Wilson, 4 Barr, 431; Weber *v.* Samuel, 7 Barr, 499; Lea's Appeal, 9 Barr, 504; Phœnix Bank, *v.* Sullivan, 9 Pick., 410; Decatur *v.* Cheaumont, 2 Paige, 490; Ashurst *v.* Martin, 9 Porter, 566. In some of the cases, four months only have been allowed for the execution of a release by creditors residing in a foreign country. In this instance, the claimant is a citizen of Kentucky, and the time for presenting his exceptions, was extended to years. Adopting his own opinion of his rights, under what peculiar hardship does he labor?

The accounts having therefore been confirmed without exception, and remained in that condition, apply the Pennsylvania

law to this state of facts. In Weber *v.* Samuel, 7 Barr, 499, the Supreme Court of Pennsylvania say, "The Court of Common Pleas having jurisdiction over the fund, and jurisdiction over the assignees, after a hearing, having made a *decree* concerning the distribution of the funds in the hands of the assignees, arising under this assignment, and which are claimed in this suit; and the assignees having conformed to that decree and paid the money accordingly, they are protected." "It would be a sorry spectacle for a lover of jurisprudence to witness a Court making a *decree* for the distribution of the fund, over which it had jurisdiction, and which decree it had power to enforce by sequestration of the goods and attachment of the person of the trustee, when an individual asked to be heard, and was turned over to another jurisdiction where he might treat the decree as a nullity, because he was not a party." "In support of this view of the case, to wit, that the *judgment* or *decree* of a court of competent jurisdiction protects those who are within its grasp or process, and yield it obedience, and cannot be overhauled in a collateral suit, I refer to Mayer *v.* Foulkrod, 4 Wash. C. C. Rep. 504; Philips *v.* Hunter, 2 H. Bl. 402." In Moore's appeal, 10 Barr, 435, in reference to such accounts as the present, the same Court say: "The set-"tlements were properly made, each and every year; and when "confirmed, were definitive *decrees* or *judgments* of the Court "of Common Pleas, which are not open to examination, except "on an appeal in each case to the Supreme Court, taken within "three years after each decree." 36th Section of Act of Assembly of 14th June, 1836. By this principle, quoted from recent cases, but which has generally been regarded as law, the defendants have regulated their conduct, and on it they have been resting with confidence. Shall they continue to have its protection? This is the question which the case will be found to present for the opinion of the Court. While it is not so important as that which our distinguished antagonist has been pleased to suppose involved,—"a practical nullification of the laws of the United States;" it would, on the other hand, be difficult to

exaggerate its importance. The accounts embrace millions. The proceeding concerns the defendants as well as the creditors of the corporation. The law of Pennsylvania gave them the right to suppose their accounts settled, and they have so supposed them. It may well be believed that during this time, they have lost to some extent the means of explanation and defence, by the death of parties, and the oblivion which time produces. Lastly, the principle contended for by the complainant would apply, not merely to the accounts of trustees, but to those of executors and administrators, whenever a creditor or an heir may happen to reside out of the State. Decrees of court thus become not only worthless, but the means of deception.

On the 16th of December, 1846, the complainant filed his bill. It recites the charter of the Bank; the several deeds of assignment, their legal effect and purposes; and charges that the debt due to the complainant is comprehended and provided for in all the said deeds. It sets forth the rendition of a judgment in favor of George Beach, in the District Court for the City and County of Philadelphia, and the Commercial Court of New Orleans; the assignment of the judgment, and the post notes on which it was founded, by Beach to Robb, by Robb to Anderson, by Anderson to Bumley, and by Bumley to the complainant. It charges that the property, debts, effects, and assets conveyed and assigned by the Bank, in the aforesaid deeds, are amply sufficient to pay and satisfy all the debts provided for in them, including that of the complainant; but charges that the trustees have kept and continue to keep the complainant and other creditors in ignorance of the situation, condition and location of the said property, debts, effects and assets, and that he is consequently without proper information as to the manner and fidelity with which they have executed and administered the said trusts. The following is the prayer of the bill: "And your orator prays that the said honorable Court may decree and direct the said defendants *to exhibit a full and entire account of the whole trust property conveyed to them, and of the disposition of the said property;* and he fur-

ther prays that your honorable Court may direct and decree that the said defendants shall pay your orator his just demand without abatement, and shall admit him to an equal and fair distribution of the trust funds, severally conveyed to the defendants, with the other creditors of the said Bank; and that your orator may have such other and further relief as may be agreeable to equity and good conscience."

The date at which the bill was filed is worthy of remark. It was several months after the account of the June trust had been filed; nearly four years after the first account of the September trust; and nearly a year after the fourth account of that trust. On the 6th of September, 1841, George Beach recovered, in the District Court for the city and county of Philadelphia, the judgment which has been mentioned, and which constitutes the foundation of the proceeding. On the 5th of February, 1845, it was assigned to the complainant. The judgment was recovered after the execution of the deeds of assignment; it would otherwise have been satisfied by property of the bank. It was assigned more than three years afterwards. It was assigned after five of the accounts had been confirmed. The complainant claims subject entirely to the deeds, and not against them;—thus approving, adopting, and validating them, and constituting the trustees named therein, his trustees.—Let me incidentally inquire whether, when he received this assignment, he had no knowledge, in contemplation of law, of what our record contained,—of what his trustees had done? Was he not bound to make inquiry? Must he be supposed to have purchased this large judgment, amounting to $53,688 66,—and with interest to more than $64,000,—without knowing or considering what he was buying? Did he not take it, according to an uninterrupted current of authority, subject to all the equities existing in the original debtor, and its representatives? Was he not obliged to inquire, and to know, what had been done or permitted by his assignors? Was he not obliged to know that these accounts had been filed, and that, by the omission of his assignors, or any other creditor, to object, jurisdiction had *attached* in the Com-

mon Pleas to the whole subject matter of the trust? Berry *v.* Hartman, 4 S. & R. 177; Northampton Bank *v.* Balliet, 8 W. & S. 318; Rice *v.* McKennar, 3 Barr, 140; Natchez *v.* Minor, 9 S. & M; Scott *v.* Shreeve, 12 Wheaton, 605; Barrow *v.* Bispham, 6 Halsted, 110.

To the bill of the complainant the defendants pleaded as follows: "These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's said bill mentioned to be true, in such manner and form as the same are therein and thereby set forth and alleged, do plead thereunto, and for plea say, that the said corporation mentioned in said complainant's bill, viz., the President, Directors and Company of the Bank of the United States, incorporated by the State of Pennsylvania, and having its banking-house and chief place of business in the city of Philadelphia, did, on the fourth and sixth days of September, in the year one thousand eight hundred and forty-one, execute and deliver to these defendants, assignments and transfers of certain property upon trusts therein particularly set forth—as by reference to copies of said assignments attached hereto, and made by reference part of this their plea, will fully and at large appear; that said assignments, after having been duly proved, were afterwards, to wit, on the fourth and seventh days of September, A. D. 1841, recorded, according to the statute of Pennsylvania in such case made and provided, in the office for the recording of deeds, &c., for the city and county of Philadelphia—the execution of the trusts thereof having been previously accepted by these defendants. And these defendants further aver, that, in accordance with the provisions of the laws of the said State of Pennsylvania, full and complete jurisdiction of and over the said trust fund so conveyed to these defendants, and of and over the execution of the said trusts, and of and over these defendants personally, as trustees as aforesaid, was and is vested in the Court of Common Pleas of the city and county of Philadelphia, which now has cognizance of the same, with ample power and authority in said tribunal to

enforce the execution of the said trusts, to decide upon the rights of all parties claiming an interest therein, and right and justice fully to administer in the premises; that in the execution of the trusts aforesaid, and the collection of the assets so assigned to them, these defendants have been governed by the laws of Pennsylvania, and, among other things, by certain laws of the said State, by which they have been compelled to accept and receive from their debtors, in payment of debts due to the said Bank or to the said trustees, at par, the notes and other evidences of debt issued or created by the said Bank." The several proceedings in the Common Pleas, which I have already stated in substance, are then minutely set forth, and the pleas conclude in the following words: "And these defendants further aver, that in pursuance of the direction and decree of the said Court, they have distributed and paid over large sums of money, being the proceeds of the assets assigned to them as aforesaid, and have likewise, under the direction of the said Court, invested large sums of money to await the result of pending litigation, and in all other respects have conformed to the directions of the said Court in relation to the trust aforesaid. All which matters and things these defendants do aver to be true, and plead the same to the whole of the said bill, and humbly demand the judgment of this honorable Court, whether they ought to be compelled to make answer to the said bill of complaint; and humbly pray to be hence dismissed, with reasonable costs and charges in this behalf most wrongfully sustained." The plea filed by each trust is in substantially the same form.

On the effect of these pleas, the Judges of the Circuit Court differed in opinion, and they have certified that difference to this Court. The question is thus fairly presented, WHETHER THE FEDERAL COURT NOW HAS ANY JURISDICTION OVER THE EXECUTION OF THE TRUSTS OF THESE ASSIGNMENTS. The complainant contends that it has jurisdiction. We maintain that the State Court has, by its past action, obtained exclusive control over the trustees, and the entire subject matter of the trust.

The counsel of the complainant has advanced, in support of his case, three propositions, in the interrogative form. *First*, Had the complainant a right, by the Constitution and the laws of the United States, to resort to the Federal tribunal? *Second*, Could he be divested of that right by the laws of any State, in the passage of which he had no voice? *Third*, If the State of Pennsylvania could divest a citizen of Kentucky of a right with which he is invested by the Constitution of the United States, has that been done by the laws of that State, and the proceedings which have taken place under them?

It is unnecessary to discuss the *first* of these questions. The facts do not present it. If Mr. Shelby had filed his bill in the Federal Court before the settlements had been made in the State Court, the inquiry would have been pertinent. The trustees would as willingly, if legally called upon, have exhibited their accounts in the former Court as in the latter. This was not done. On the contrary, they were compelled, by citations issued by other creditors, and permitted by Mr. Shelby and his assignors, to commence and continue their settlements in the Common Pleas. To go back now, and to discuss the right of the complainant to resort, in the first instance, to the Federal tribunal, would be to raise up an inquiry of no legitimate existence, and no practical importance. The question is not as to the original right of the claimant to resort to one tribunal or the other, but as to his right, in the face of the proceedings and decrees in the Common Pleas, to require the defendants to account again in the Circuit Court.

The *sccond* proposition is not accurate. There is a difference between the passage of State laws and actual decisions of Courts of Justice. If these accounts had been settled by an act of the Legislature of Pennsylvania, the argument would have possessed some force. The Legislature of that State has not professed to exclude the Federal judiciary from any authority which it rightfully claims. Her Court has, in this instance, acted under her general statutory law on the subject of assignments. If the whole body of that law were uncon-

stitutional, the undisputed and undisturbed action of her Court under it, might be perfectly valid. It is sufficient, at present, to mark this distinction.

Taking all the positions of the complainant together, it is not difficult to point out their fallacy. It is assumed that there is no such thing as a proceeding in a competent Court, and an adjudication *in rem*, which by reason of its operation on the subject matter of the proceeding, shall determine conclusively the rights of the claimants, without regard to their residence, character, or capacity. The decisions supply abundant illustrations. A replevin is issued out of a State Court, and a ship seized by the Sheriff. A libel is subsequently filed in the Admiralty, and an attachment served by the Marshal. Is there a doubt that the State Court would retain its jurisdiction, and dispose of the property? That is the very point of Taylor *vs.* The Royal Saxon, 1 Wallace, Jr., 311. Here the claimant lost his remedy in the Admiralty, not because his claim was defective, nor because the action of replevin had been decided by the State Court, but because it was pending. The ground of the decision is sufficiently obvious. It was to prevent the conflict of jurisdiction which must otherwise have occurred between the Courts. GRIER, J. "The principle that the first tribunal which has possession of the subject matter should be left to determine it conclusively, is not founded on mere comity, but on necessity, and to avoid the unpleasant collision of jurisdiction which would otherwise ensue." Would not the complainant's positions apply equally well to that case? Had not the claimant as clear a right to file his libel in the Admiralty, as a citizen of Kentucky has, under the Constitution and Judiciary Act, to bring his bill in the Circuit Court? Could the State of Pennsylvania pass any law to prevent him? Had the replevin been actually determined in the State Court? In this respect, ours is the stronger case; for here we have final and conclusive decrees.—Take the case of an attachment of money in a State Court, and a subsequent suit for the same money in a Court of the United States. Jurisdiction has vested in the former. Why? Because

that Court has first obtained possession of the matter in dispute; and to disturb that possession would produce the collision which the law seeks to avoid. The illustration is drawn from Wallace *vs.* McConnell, 13 Peters, 136. Here again the complainant's positions would apply with as much force as to the case under consideration.

These are instances of proceedings *in rem.* I do not now stop to inquire whether the settlements in the Common Pleas fall strictly within these limits; if not, they are certainly closely analogous to such proceedings. In Weber *v.* Samuel already quoted, the Supreme Court of Pennsylvania, by whom the subject must be supposed best understood, hold them to be strictly *in rem.* COULTER, J. "The proceeding in the Common Pleas ought to be regarded as a proceeding *in rem,* which binds all the world. It is the fund or property concerning which the Court decree, and notice is directed by the statute to be given, not to the cestuis que trust named in the deed, but to everybody, by means of publications."—It is sufficient for the present to have shown that there are cases in which the original right of the party to proceed in one Court or the other is lost sight of; and the real question is, whether jurisdiction has *attached,* and whether it would produce a collision between the tribunals to disturb it.

In opposition to the reasoning of the complainant, the following propositions are submitted.

I. The assignor being a local corporation created by the Legislature of Pennsylvania, a resident of that State, (so far as a corporation can be,) and liable for its debts in the manner prescribed by the laws thereof, the validity and effect of the assignments should be determined, and the administration of the assigned estate regulated, by the tribunals and the rules which those laws have established; and a suit like the present, brought to compel execution of trusts created by such local corporation, to citizens of Pennsylvania, to secure the payment

of its liabilities, in pursuance of the laws of that State, controlling and regulating the entire subject matter, is not within the jurisdiction of the Courts of the United States.

II. Jurisdiction had *attached* in the State Court by the settlement therein of the partial accounts of the trustees, and having thus become vested in that tribunal, the Federal Court could not withdraw it, nor in any manner interfere with its exercise.

III. The defendants having partially settled their accounts in the State Court, may be compelled to settle their future accounts in the same Court; and if the present bill be sustained, may also be compelled to settle, at additional expense to the trust estate, their accounts in a Court of the United States, which may be governed by different rules, and may adjust the same accounts on different principles.

I. We have deemed it proper to place before the Court, for their consideration, these several propositions. The representatives of parties, who, in their turn, represent a numerous body of creditors, of whose views they have no knowledge, but to whom they are legally responsible, we have not felt at liberty to abandon any defensible ground. The first proposition will not be pressed in the argument. When the case shall occur, to present the question fairly, it will be found worthy of the consideration of the Court. In the midst of more easily tenable positions, we do not intend to stake the cause on that point.

II. The second proposition embraces two questions, which may be separately considered.

1. Under what circumstances, and to what subjects, may the jurisdiction of one of two Courts having concurrent jurisdiction *attach*, so as to prevent the exercise of jurisdiction by the other?

The decisions on this point are numerous and elaborate. To state the most pointed of them with brevity, and to classify them with accuracy, is my only aim. To offer what shall be new to the Court, I have no expectation. The ability to do so, might justly be regarded a demerit of the case.

I direct attention, in the *first* place, to the conflict of jurisdiction between Courts of Equity and Law. In Smith *vs.* McIver, 9 Wheaton, 532, this Court held, that a case of alledged fraud, of which a Court of Equity and of Law had concurrent jurisdiction, must be conclusively determined by the Law Court,—which first had possession of the subject. Pratt *vs.* Northam, 5 Mason, 95, was a bill to obtain discovery of assets of a decedent in favor of legatees. The case was pronounced one of concurrent jurisdiction, in the Courts of the United States and the State Courts, not of exclusive jurisdiction in the latter, and a settlement in the State Court, obtained by fraud, was decided by the former not to be conclusive. Had no fraud existed, the decree obtained in the State Court must, on the principles maintained in the decision, necessarily have been final. In Merrill *vs.* Lake, 16 Ohio R., 373, it was held, that the Supreme Court and Court of Common Pleas having equal and concurrent jurisdiction of a case in Chancery, if the latter obtain possession of the case by bill, it will retain it until final adjudication. The settlements in the Common Pleas of Philadelphia were, to some extent, chancery proceedings. In our mixed system, they partake largely of this character. Why should the Court interrupt them now? Why should they be permitted to go half finished? Why stop them between the interlocutory and the final decree?

Second. Before leaving the subject of Equity, I may be permitted to diverge so far from the prescribed line of the argument, as to cite the familiar principle, that where the law furnishes a complete remedy, equity will yield no redress. Russell *vs.* Clark, 7 Cranch, 89; Baker *vs.* Biddle, 1 Baldwin, 394. From the opinion of Chief Justice Marshall in Smith *vs.* McIver, already

cited, I quote the following passage: "The facts alledged are "all examinable at law, and a Court of Law is as capable of de- "ciding on them as a Court of Equity. In such a case, the exist- "ence of some fact which disables the party having the law in his "favor, from bringing his case fairly and fully before a Court of "Law, has been generally supposed to be indispensable to the "jurisdiction of a Court of Equity. Some defect of testimony, "some disability which a Court of Law cannot remove, is usually "alledged as a motive for coming into a Court of Equity." What does the complainant oppose to this? Has he not a complete remedy in the Common Pleas? What other creditor of the Bank has not found his remedy there? Who else complains of the jurisdiction? If injustice have been done, why not first send him to that Court with his application? Why may he not go there, and set forth the errors of which he alledges the existence, and move to open the accounts?

Third. I recur to proceedings strictly *in rem.* The subjects of replevin in the State Court, and attachment in the Admiralty, and attachments of money in one court, and suits for the debt in another, have already been noticed. In Taylor *v.* The Royal Saxon, 1 Wallace, Jr., 311. Mr. Justice GRIER holds this language,—"We have then two equal and independent tribunals with concurrent jurisdiction of the parties, and the subject matter in contest. The State Court has first taken cognizance of the question of possession and property between these parties. And if it were an action of trespass, where the same question might be collaterally decided in a suit by A. *v.* B. in one Court, that might arise in a suit by B. *v.* A. in the other, it may be admitted that the pendency of such a suit in one Court, would be no bar to a proceeding in the other, merely because the same question was involved and might be decided. But we have something more. The State Court has taken possession by her officer of the thing, or subject matter in controversy, and disposed of it according to law, It is true the Court have not decided the question of property between the parties;

that is still pending; but until that question is decided, the possession of the matter in dispute is disposed of according to the law of the land." In Wallace *v.* McConnell, 13 Peters, 136, the same general principle was announced by this Court in a different form. It was there held that an attachment commenced and conducted to a conclusion before the institution of a suit against the debtor in a Court of the United States, may be set up as a defence to the suit; and the defendant would be prohibited *pro tanto* under a recovery had by virtue of the attachment, and could plead such recovery in bar. So too, an attachment pending in a State Court, prior to the commencement of a suit in the Court of the United States may be pleaded in abatement. The attachment of the debt in such case in the hands of the defendant, would fix it there in favor of the attaching creditors, and the defendant could not afterwards pay it over to the plaintiff. The attaching creditor would in such a case acquire a lien on the debt, binding on the defendant: and which the Courts of all other governments, if they recognize such proceedings at all, would not fail to regard.—This is but an illustration of the principle which I am endeavoring to show runs throughout our jurisprudence, that wherever one Court competent to act, has rightful possession of any subject of controversy, no other Court can touch it until the work of the former is accomplished and ended, and in most cases, not then unless it possess by statute appellate power. Campbell *v.* Emerson, 2 McLean, 30; Embree *v.* Collins, 5 Johnson, 101; Holmes *v.* Remsen, 20 Johnson, 229. The case of the ship Robert Fulton, Paine's Reports, 620, is particularly in point. A vessel was libelled in the District Court of the United States for materials furnished. The claimants set forth in their claim, that they had attached the vessel in a State Court, the day before the filing of the libel, and prayed the advice and protection of the Court in regard to their priority under the attachment; and if the vessel should be decreed to be sold, prayed that they might be first paid. THOMPSON, J.: "There was

"then a concurrent jurisdiction in the two courts, and the pro-
"ceedings under the State authority were *in the nature of* pro-
"ceedings *in rem;* and the right to maintain the jurisdiction,
"must attach to that tribunal which first exercises it, and takes
"possession of the thing in litigation. This course is indispen-
"sable, in order to avoid a clashing of jurisdiction."

The reasons of the rule adopted in all such cases, are well set forth by Mr. JUSTICE GRIER, in Peck *v.* Jenness, 7 Howard, 612. "Where a court has jurisdiction, it has a right to decide "every question which occurs in the cause; and whether its "decision be correct or otherwise, its judgment, until reversed, "is regarded as binding in every other court; and where the "jurisdiction of a court, and the right of a plaintiff to prosecute "his suit in it, have once attached, that right cannot be arrested "or taken away by proceedings in another court. These rules "have their foundation, not merely in comity, but in necessity. "For if one may enjoin, the other may retort by injunction, "and thus the parties be without remedy; being liable to a "process for contempt, in one, if they dare to proceed in the "other. Neither can one take property from the custody of "the other by replevin or any other process, for this would "produce a conflict extremely embarrassing to the administra-
"tion of justice."

If it be said, that to bring the present case within the range of the principles which govern proceedings *in rem*, it is necessary that the Court should have possession of the money whose distribution is the result of the proceeding, I reply, that for all practical purposes they have it. Is it not invested and distributed solely under the direction of the Court? Are not the trustees, to all intents and purposes, merely Officers of the Court? What better possession have the Court of a vessel attached for materials, or a cargo seized under a replevin, than of this money? But I do not concede the existence of such necessity. The filing of a mechanic's claim against a building for labor and materials, is the most common instance of a pro-

ceeding *in rem*,—and in that case possession of the subject matter of the claim is physically impossible. It is as impossible that the Court should have better possession than it has, of the property held by these defendants.

Fourth. The same principle extends to the conflict of criminal jurisdiction. In The State *v.* Yarbrough, 1 Hawk's R. 78, to an indictment for an assault in the Superior Court, the defendant pleaded in abatement, that a prior indictment was pending against him in the County Court for the same cause. The plea was determined to be good, on the ground that the Courts had concurrent jurisdiction; and that to avoid the mischief of two indictments for the same cause against the same person, the jurisdiction should be held to have attached in the County Court by the prior finding of the bill. It was argued that public justice might be evaded by an offender procuring an indictment against himself in the County Court, where a trivial punishment would secure him from prosecution in the Superior Court; but this consideration was made to yield to the danger of a collision between the Courts. It might well have been contended, that the proceeding in the County Court was only commenced, not determined; that the defendant, if acquitted or convicted in the Superior Court, might plead his acquittal or conviction in bar of the indictment in the former. The Court thought otherwise. They held, that the mere fact that the prosecution had been *commenced*, was a sufficient plea.—Let it not be said this was a criminal proceeding, and involved the personal liberty of the defendant and considerations peculiar to that right. The case did not turn on any such point. It respected simply, and only, the regulation of concurrent jurisdiction.

The cases thus cited, have been selected from the various departments of the law in which conflict of jurisdiction might be supposed most naturally to arise. Others might be readily added; but the present may suffice. To go further, would be to incur the imputation of needless repetition.

2. Has the jurisdiction of the Common Pleas of Philadelphia, by the filing and settlement of the accounts of the defendants in that Court, *attached*, within the meaning and spirit of the decisions, in such a manner as to prevent the Circuit Court from taking cognizance of the accounts and the subjects they embrace?

In Campbell *v.* Emerson, a suit had been commenced. In the case of the ship Robert Fulton, an attachment had been granted. In Taylor *v.* The Royal Saxon, a replevin had been issued. In Smith *v.* McIver, possession of the subject is said to decide the question of jurisdiction. In Hall *v.* Dana, 2 Aiken's Vermont Reports, 381, "application first made," is pronounced the test. In Stearns *v.* Stearns, 16 Massachusetts' R., 171, it is "proceedings first had." Bemis *v.* Stearns, *ibid*, 203, was an appeal from a decree of a judge of probate, who had concurrent jurisdiction in certain cases with the Court of Common Pleas. *A petition having been presented* to that Court before the institution of proceedings in the Probate Court, it was held, that the former could not be ousted of its jurisdiction. Why should the filing of a petition, or the issuing of a writ, be held to fix the jurisdiction of the Court which autho rizes it, and not the filing of an entire account, the adjustment of it, the adjudication of the rights of parties interested in it, the decree of the Court upon it, the actual distribution of the balance exhibited by it,—of all which, the probate of the will is but the merest inception? Why should matters of form be allowed to work such important differences in result? If, in the present case, possession of the subject be the criterion, the Common Pleas has for years had undisturbed and exclusive possession of it. The pleas set forth the several proceedings which have been had in that Court. More than all this, the questions to which those proceedings have given rise, have been actually decided, and the final judgments of the Court pronounced upon them. Your Honors cannot presume that this has been done without exceptions on the part of creditors. What are these exceptions? Are they not proceedings at law? Do they not involve issues

both of fact and law? Why should the exceptants be drawn here to argue them, and be deprived of the right of a hearing in the State Court? Is all this not equal to the filing of a libel, or the issuing of a writ?

We shall be asked, what is the subject matter of the present proceeding to which the jurisdiction of the Common Pleas has attached? Is it to the schedule of the assigned effects? Is it to any particular portion of the property? Is it to any one of the accounts? Does it depend on the action and decree of the Court on each of the accounts, whether that account and the property embraced in it shall be included in or excluded from the operation of the principle,—whether it shall be retained under the jurisdiction of one Court, or delivered over to that of the other? I reply, that the subject matter which the decisions contemplate can in this instance be nothing more nor less than the trusts which the defendants have undertaken to execute,—the property conveyed by the assignments,—the responsibilities imposed by them,—the duties they have enjoined, —and the rights they have conferred. If it mean anything less, it means nothing. Of this entire subject, the Common Pleas have had possession,—on it they have judicially acted without interruption,—are now acting as heretofore,—will never consent to cease to act until the last dollar of the property has been accounted for, and the last duty of the trustees discharged. Until that period shall arrive, we must presume they will continue to exercise, both over the trust property and the trustees, the same unbroken control.

Another important inquiry presents itself at the present stage of the discussion. It will be asked, why not allow the accounts which have heretofore been filed, to remain undisturbed, and compel the exhibition of the subsequent accounts in the Circuit Court?—I answer, that upon the principles heretofore stated, the jurisdiction of that Court over the entire trust is gone. I answer further, that all the accounts are but parts of a whole,—conclusive as far as they go, but unfinished parts of the same thing. They constitute in reality but one account,

solid as the sides of a building are solid, but incomplete without the roof. The property whose distribution is the object of the settlements, has in each case passed under one deed, and there is no more warrant for placing a portion of it under the jurisdiction of the Circuit Court, than for placing the whole. The duties and liabilities of the assignees are jointly imposed by each instrument. What reason would there be to subject them during one month to the jurisdiction of the Common Pleas, and during the next, to that of the Circuit Court? What reason for subjecting their conduct respecting stocks in New Orleans to the action of the former, and their conduct respecting real estate in Philadelphia to that of the latter?

Suppose the future accounts filed in the Circuit Court. They would start with the balance exhibited by the last account in the Common Pleas. This sum is the result of all the previous items of the past accounts. Enquire into it, and you disturb them all. In the new accounts, items would occur, not only similar to those contained in the past, but so completely interwoven with them, as to be incapable on any principle of law or reason of disseverance and separation, by opposite decision. To illustrate,—assets have been sold and the purchase money is payable by instalments. Some of the payments have been made and carried into the accounts heretofore filed. The Court have examined these items, and in doing so, have directly and finally adjudicated upon the fact of the sale, the adequacy of the price, and the propriety of the transaction. The remaining instalments, when paid, would be carried into the new accounts. The Circuit Court would approach, for the first time, the consideration of the questions which they may be made to present. It must have the right to examine and decide such questions, or the act of this Court in requiring the restatement of the accounts, would be nugatory and absurd. In the meantime, witnesses have died, papers have been lost, and the accountants are without the means of explaining some part of the transaction, and the considerations which influenced their conduct. The entire subject is thus once more brought into controversy.

In the end, the Circuit Court reach a conclusion different from that of the Common Pleas, and refuse to allow the credits which are claimed. I do not say such a case would occur, but it might occur; and against the possibility of its occurrence, the accountants have a right to require complete protection. To permit it to arise, is to bring about the very collision of decision which the Courts have hitherto so effectively labored to avert.

On the other hand, point to any advantage which can arise from the distribution of such accounts for settlement among different and independent tribunals. There is scarcely an item in the past accounts, as I have intimated, which will not run into the future, or be found closely connected with items contained in the latter. Why lodge one for settlement here and another there? Would a merchant having a series of private accounts to settle, knit together as these are, and desirous only to obtain a correct final result from the whole, commit a portion of them to one accountant, and the remainder to another? What probability of his attaining his end? If there be any efficacy in this principle of segregation, why not push it further, and dividing in twain each account, commit a segment of it to one accounting power, and the remainder to another?

In any event, what advantage could arise from committing the settlement of accounts of this nature, to the Federal Courts? With what machinery shall those Courts work? Where are the Acts of Congress and rules of Court applicable to the subject? How, when, where, and by whom is the inventory of the assets to be filed? How, when, and by whom, is the appraisement to be made? What about giving security? Suppose the sureties of the accountants fail, when, and in what manner substitute others? In what manner shall neglecting or defaulting trustees be removed? At what stated periods are accounts to be considered as confirmed and beyond exception? By whom, in what form, and at what time, are the several creditors having an interest in the settlements, to be notified of the proceedings? Or is it a part of the argument of the complainant, that each

creditor has a right to require for himself a settlement of all the accounts, and that the trustees may be compelled, at their own expense, or that of the trust estate, or of both, to make the same settlements as many times over in the same Court, or different Courts, as there are creditors to make claim? I am not unmindful, that if the result aimed at be just, it would not be difficult to devise the forms and modes of proceeding necessary for its accomplishment. From their entire absence up to this time, I infer the absence of an intention on the part of Congress and the Court, that such jurisdiction should ever be exercised. I infer it, as I infer that a pillar is intended to remain stationary, when I see no means provided for changing its position. I infer it, as I infer that a human body was designed to move, when I discover the power of motion in its structure.—But this argument runs into,—

III. The third proposition, which remains to be considered, namely; that the defendants having partially settled their accounts in the State Court, may be compelled to settle their future accounts in the same Court; and, if the present bill be sustained, may also be compelled to settle, at additional expense to the trust estate, their accounts in a Court of the United States, which may be governed by different rules, and may adjust the same accounts on different principles.

The accountants must continue to file their accounts in the State Court. It has not been pretended that this Court has any power to arrest the proceedings of the former. Whatever be the powers of any other Court, that tribunal has assumed to itself jurisdiction, and will retain it. Other creditors have acquired rights there which it will doubtless regard itself bound to protect. The seventh section of the Act of Assembly of Pennsylvania of the 14th of June, 1836, expressly confers on that Court the power, "on the application "of any person interested, or co-trustee, or co-assignee, to issue "a citation to any assignee or trustee for the benefit of credi- "tors, whether appointed by any voluntary assignment or in

"pursuance of the laws relating to insolvent debtors and domes-
"tic attachments, requiring such assignee or trustee to appear
"and exhibit, under oath or affirmation, the accounts of the
"trust, in the said Court, within a certain time to be named
"in such citation." I have remarked that this power has here-
tofore been exercised in compelling the settlement of the pre-
sent accounts. That it would be brought into requisition again,
if the trustees refused to file their accounts in that Court, must
in this argument be assumed. We know what the exercise of
such a power means. It means imprisonment. It means that the
Court would not only imprison, but keep the accountants in
custody until its order was obeyed. What power has the
Federal Court to discharge them? Whence does it derive such
power? What clause of the Constitution, or what Act of Con-
gress, confers it? The trustees could not say, we are now
under the jurisdiction of a Court of the United States. The
Common Pleas would reply, that Court has but concurrent
jurisdiction with us, and lays claim to no higher. It does not
profess to have exclusive jurisdiction. Having first obtained
possession of the subject, we shall retain it. And they would
retain it. The trustees have no right of appeal to this Court,
and no power to remove into it, the proceedings of the Common
Pleas. *First:* They are not defendants. They are in one sense
merely disinterested stakeholders of the trust property. This
would unquestionably give them the right, by a proceeding in
equity, if the conflict became too severe, to free themselves
of the property by rolling it in upon the Court, and thus
adding the capstone to the misfortunes of the creditors. *Se-
condly:* They are not citizens of "another State," but are all
citizens of Pennsylvania. To lay the ground of a removal
into the Federal Court, the Act of 1789 demands as an essen-
tial pre-requisite, the union of both these incidents.

Assuming, then, that if the prayer of the present bill be
granted, the trustees will also be compelled to file their future
accounts in the State Court, I propose to trace the practical
consequences, which might, on ordinary principles, be expected

to result. That all such consequences would inevitably happen, and happen in the manner I shall designate, it is beyond human foresight to discover. The possibility, much less probability, that any one of them, much less all of them, may occur, it is respectfully submitted, constitutes sufficient legal reason for the establishment of a principle to prevent them.

The first account filed in each Court would necessarily contain the same items, and exhibit the same sum for distribution. The Accountants would take their first step in obedience to the following provision contained substantially in each assignment: "It is hereby expressly declared, understood and agreed, as "the condition of this indenture and the trusts therein and "thereby created, that before the said Trustees, their successors "or assigns, shall proceed to make or declare any dividend of "the moneys raised or collected as aforesaid, they shall give "thirty days notice of their intention so to do, in two or more "of the daily newspapers published in the City of Philadelphia, "at least twice a week during the said period of thirty days, "calling upon the claimants to come forward and prove their "debts; and such dividend shall be declared and made only on "the amounts so brought forward and proved." The Pennsylvania Statute requires an additional notice. The Circuit Court would doubtless direct the publication of a similar one. We should thus have two public advertisements calling upon creditors to claim, at the same time, two funds in different Courts. We may well suppose there are those on whose ears such an announcement would fall with no ungrateful cadence, so far as it tended to reveal two-fold chances of obtaining payment of their debts. In the case of the European creditors, to whom no preference was given by the assignments, we may imagine it would excite a tenderness of emotion, which their past condition was not well fitted to inspire. To be aroused from the despondent inaction which the circumstance of the entire omission of their names from the assignments, was adapted to produce, by an invitation to claim payment of their debts in two places at the same time, if it did not constitute an era in

the history of Holland, would at least mark an important event in the distribution of insolvent estates.

A large portion of the obligations of the Bank, it may be presumed from the nature of its business, are held by a different class of persons,—namely, by those in humble circumstances in life; and this Court would not, I apprehend, be inclined to overlook so important a fact. The effect of such a mode of distribution on this class of claimants, as well as others, may be easily foreseen. The claims of some would be proved in the Common Pleas, and of others in the Federal Court. Claims disallowed by one tribunal would not fail to find their way, for some purpose, to the other. A more fortunate class would be actually presented and proven before each tribunal. A greater difficulty would present itself. In one place creditors would claim on notes of the Bank, and produce them; in the other, different creditors would claim on judgments obtained on the same notes. Concede that the proceedings of the Circuit Court, which holds two terms in a year, shall keep pace with those of the Common Pleas which holds four,—who shall go from Court to Court, and by communicating information at every turn of affairs, prevent inequality and injustice? Surely no one would ask to impose this duty on those for whose especial discomfort these improvements are proposed.

But at what result would each Court arrive? The Circuit Court may disallow credits to the amount of one thousand dollars; the Common Pleas may surcharge to the amount of two thousand. The Circuit Court may allow five per cent. for expenses, &c.; the Common Pleas, three. The Auditors appointed by the Common Pleas may receive for their services an allowance much smaller than that claimed by the Master in Equity,—for his labor in discharging unaccustomed duties must be greater. The former Court may thus award a dividend of twenty per cent. of the debts due by the Bank; the latter of fifteen per cent.

Other questions may present an opportnnity for difference of

judgment. The trustees have been compelled by the Legislature of the State, to do many official acts. The pleas set forth, "that in the execution of the trusts aforesaid, and the collection "of the assets so assigned to them, these defendants have been "governed by the Laws of Pennsylvania, and among other "things, by certain laws of said State which have compelled "them to accept and receive from their debtors in payment of "debts, the notes and other liabilities of said Bank of the United "States at par." The amounts so received may be computed at several hundred thousand dollars. The trustees have been obliged to accept them, or encounter the hazard of losing the debt and being charged with the amount of it. Will the Circuit Court coincide in the decision pronounced on this point by the Common Pleas, which the accountants have been compelled to obey?

In effecting these resettlements, and determining these several questions, an additional outlay of funds will be necessary. To require Clerks of Court, Auditors, Masters in Chancery, and professional advisers to contribute their toil, and assume onerous responsibility gratuitously, however correct in theory, would, I apprehend, be found to work with some degree of inconvenience in practice. It is needless to say, these expenses must be borne by the trust fund. The creditors are then the only losers. Are their losses not already sufficiently great? Why should their means of payment be further diminished?

Let us suppose that each tribunal has finished its work and declared its dividend. I do not ask in what manner the trustees shall pay both dividends out of one fund,—but how are they to pay either? The Sheriff would apply with his attachment for one amount, the Marshal for another. Suppose they were able to pay both,—with what sum should their next account commence; and with what the account which succeeds to that? How start the same account with different balances? If they could do so entire an impossibility and absurdity, where would it all end?

Is this confusion or what is it? Has a case ever been decided which furnishes a more apt example of the *collision* which it has heretofore been the highest study and the wisest policy of all Courts to avoid? The term generally employed in the decisions is a borrowed one, and borrowed for some purpose. It is used to express the dashing of ship against ship to the injury of both. Why dash Court against Court? What overwhelming necessity is there for this disorder? Are not the relations of our Federal and State authorities sufficiently disturbed and sufficiently capable of being disturbed? Why cast into the whirlpool these new and peaceful elements?—nay, these grand objects and instruments for the preservation of peace.

In all this it is evident there is something wrong. What is it, and where is it? Has the Federal Court, if it should determine to exercise jurisdiction over the trust, any power to arrest the proceedings in the Common Pleas? The learned Counsel has not so argued. Am I mistaken in supposing it possible these Courts may differ in opinion on the multitudinous subjects presented in the accounts? I could hope such might be the case, but it is quite clear there are not two men living who would coincide in opinion on them all. It is improbable the trustees themselves, with as much knowledge of the subjects as others can ever possess, have at all times been unanimous in their views. Where then lies the mistake? I answer, simply in not permitting the Court which has first rightfully obtained jurisdiction of the subject, to retain it.

If the Court refuse the prayer of this bill, how will the complainant be injured? If he still suppose error to exist in the accounts, let him go to the Common Pleas and move to open them. If he has accepted no part of the dividends heretofore declared by the accountants, (on this point, I would not be permitted by the Court to make any statement of facts,) let him come in and claim to be placed on an equality with other creditors. The very case is provided for in the assignments; "such "neglecting or defaulting creditor, bringing forward and proving

"his, her or their claim or claims in time therefor as aforesaid, "shall be entitled to receive, in addition to such dividend, an "amount equal to the rate of dividend or dividends which shall "have been before made and paid, and so on from time to time, "until a final dividend shall be declared and made." This is his remedy. Why shall he not pursue it?

In what respect will it benefit even the complainant, to grant his prayer. He is a creditor of the Bank. His interests are identified with those of other creditors. Whatever delays them, delays him; whatever diminishes the means of paying their debts, diminishes his. Whatever position he may choose for the combat, he must stand or fall with them. He may reduce the assets by litigation; but to his own distributive portion, he can add not a farthing. It is as impossible for him as for them, to escape the inconvenience and embarrassment which, I have endeavored to show, his application, if successful, may induce.

If the application be denied, will the Court have surrendered a particle of its power. If so, the point had been less earnestly pressed by the defendants. The general remark is a just one, that in every depository of power there is a natural inherent tendency to aggrandisement. It is but a slight expansion of the principle of self-protection. Its existence in a modified form is essential to the efficiency of a legal tribunal. We do not ask this Court to lay down any of its rights, or put off any portion of its authority. Will they have done so by deciding adversely to the complainant? Will they not simply have said; —The State Court has the rightful possession of the subject; your application has been too long delayed; you have remained too long without objection; why should you be allowed to come in now to create this confusion?

The ground on which I finally submit the case, is, that the trustees themselves have a right to require protection against consequences which may result from unsettling these accounts. The office of a trustee is at best a difficult, hazardous, and thankless employment. It is at the same time a necessary office. A community whose prosperity depends on the laws of

property, can as little do without it, as the individuals who compose it, can live without the shelter of houses. When a firm or a corporation, whose business has extended to every portion of the country,—whose obligations are in the hands of all classes of people,—whose property is diffused over the world, becomes unable to discharge its liabilities, what shall be done? Shall the first creditor, whose claim is ripe for judgment, seize on the property, and by sacrificing it, pay himself, to the detriment of all others? If so, or if not so, who shall gather up the fragments, and distribute to each his proper proportion? A committee of Congress? A State Legislature? A board of Commissioners appointed by Government? What guaranty have you here of experience, and capacity? Suppose the funds chance to disappear, who shall bear the loss? The law has provided for the execution of these duties by trustees, who are made responsible for their fidelity to the last farthing of their estates and those of their sureties. But a reciprocal duty is thus created. The law itself must exercise over those whom for its own purposes it has called into being, a tender, benignant, and fostering care. It must not create, but remove obstacles to the faithful discharge of their duty. It may not deal harshly with them. It may not visit them with unreasonable responsibility and hardship. Diligence, caution, prudence, and the utmost purity of motive, it has the undoubted right to require. When it has exacted these, it were alike unjust and impolitic to demand more. In these respects the law, with its admirable capacity of adapting itself at the same time to the necessities of society and the infirmities of human nature, has been marked in modern times by proper liberality. An extended quotation of authorities in support of these principles cannot be necessary. Penson *v.* Brown, 4 J. C. R. 629; Dillebaugh's Est., 4 Watts, 179; Osgood *v.* Franklin, 2 J. C. R., 27; Palmer *v.* Jones, 1 Vesey, 144; Pylus *v.* Smith, 1 Vesey, Jr., 193; Barron *v.* Rheinlander, 3 J. C. R., 614; 2 Mad. C. 121; Keller's Appeal, 8 Barr, 288; Jones' Appeal, 8 W. & S., 143; Barr *v.* McKewin, 1 Bald., 154; Vez *v.*

Emory, 5 Vesey, 144; Sommer *v.* Wilt, 4 S. & R., 24; Lewin on Trusts, 117, 118; Story on Agency, sec. 201; Story's Eq., sec. 201; Belchoir *v.* Parsons, Amb., 209; King *v.* the Earl of Plymouth, 1 Dick., 126; Thompson *v.* Brown, 4 Johns., ch. 469. But against what do the present defendants ask protection? Against injury—against loss? against responsibility? This they enjoy already. But they have a right to something more—to protection from trouble—from annoyance—from litigation—from the harassing care which legal controversy causes; and which, while it benefits no one, can result only in distracting from the proper administration of their trust, that time, and labor, and intellect which are the best property of the cestui que trust. I leave the case with the Court, under the profound conviction that in the result of its deliberation, we shall find nothing to conflict with the principles heretofore established, alike so consonant to our sense of justice, and so accordant with the highest judicial policy.